

(2016) 09 CAL CK 0031

In the Calcutta High Court

Case No : C.R.A. No. 556 of 2011 With C.R.A. No. 944 of 2013

Sk. Khairul @ Makhan Sk.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 02-09-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, Section 302

Citation : (2016) 168 AIC 303

Hon'ble Judges : Nadira Patherya and Debi Prosad Dey, JJ.

Bench : Division Bench

Advocate : Mr. Madhusudan Sur and Mr. Monoranjan Mahato, Advocates, for the State; Mr. Uday Sankar Chatterjee, Mr. Suman Sarkar Chatterjee, Mr. Saumojyoti Sen, Mr. Pinak Kumar Mitra, Mr. Santanu Maji, Ms. Snigdha Saha and Mr. Manjit Chatterjee, Advocates, for the Ap

Final Decision : Dismissed

Judgement

Nandira Patherya, J. - These appeals being C.R.A.556 of 2011 and C.R.A.944 of 2013 have been filed by Sk. Khairul @ Makhan Sk. and Kashmira Begam respectively against the order of conviction and sentence dated 21st May, 2011 and 20th May, 2011 respectively for the offence under Section 302/120B I.P.C. whereby and where under the said appellants have been directed to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer simple imprisonment for three months.

2. The case of the prosecution is that Mantu Mondal, fourth brother of Habu Mondal, the defacto complainant aged 29 years resided with his wife and children in Erachia village. He was a day labourer. The daughter and son-in-law of Azijul, the elder brother of the deceased had come to visit the defacto complainant two or three days ago. As there was no sufficient accommodation in the house of the defacto complainant, the daughter and son-in-law of Azijul went at 9 p.m. on 15th September, 2010 to the house of the deceased to sleep. They were given an inner room to sleep in while the deceased, his wife and children slept on the

verandah. The wife of the deceased Kashmira, the accused appellant in C.R.A.944 of 2013 at about 10:45 p.m. woke up to feed the child milk and while feeding her child fell asleep. At 11 p.m. her husband woke her up and informed her that some unknown miscreant had stabbed him with a knife in the throat. The deceased thereafter became seriously ill and a hue and cry was raised by the wife, which attracted the neighbouring people and the defacto complainant went to the house of the deceased and found him lying unconscious with bleeding injury. Thereafter the deceased was taken to Burdwan hospital where he succumbed to his injuries.

3. An F.I.R. was filed on 16th September, 2010 by Habu Mondal, the brother of the victim and the same was received at 16:05 hours and Bhatar P.S. Case No. 44/10 dated 16th September, 2010 under Section 302 I.P.C. was started. Based on the information received from the hospital U.D. Case 1075 of 2010 was started and an inquest was conducted under Section 174 Cr.P.C. Grievous injuries were found on the neck of the deceased at the time of inquest. On completion of the inquest the body through C/2942 Sanat Sarkar was sent for postmortem examination. Postmortem was started on 16th September, 2010 at 13:40 hours. At the time of postmortem several injuries were found on the body of the victim and the opinion of the doctor was that the death was caused due to stab wound and was anti mortem and homicidal in nature.

4. On registration of the case investigation was initiated and undertaken. On completion of investigation charge-sheet was submitted against the appellants under Sections 302/120B I.P.C. The case was thereafter committed to the Court of Sessions. Charges were framed and read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. Thereafter, the case was transferred to the Court of Additional Sessions Judge, 4th Court, Burdwan for trial. In all 18 witnesses were examined and documents exhibited. The accused appellants were examined under Section 313 Cr.P.C. No D.W. was adduced. Based on the oral and documentary evidence the order of conviction and sentence was passed. Being aggrieved by the said order of conviction and sentence C.R.A. 556 of 2011 was filed by Sk. Khairul @ Makhan Sk. and C.R.A. 994 of 2013 was filed by Kashmira Begam.

5. Counsel for the accused appellants submits that the recovery made under Section 27 of the Evidence Act, cannot be relied on as it was not pursuant to any statement recorded. The I.O. (P.W.18) has nowhere in his evidence stated the nature of information given on the basis of which the recovery was made. In the absence of a statement made so also information imparted by the accused Makhan Sk. the recovery made under Section 27 of the Evidence Act is no recovery in the eye of law and cannot be relied upon. For the said proposition reliance is placed on Bhimappa Jinnappa Naganur v. State Of Karnataka, AIR 1993 SC 1469, State Of Karnataka v. M.V. Mahesh, 2003 (3) SCC 353, Subhas Bhattacharyya v. State, 1985 Criminal Law Journal 1807, Bahadul v. State Of Orissa, AIR 1979 SC 1262 : AIR 1929 Lahore 344 and 2015 Supreme

1193(Mangu Singh v. Dharmendra and Anr.), The wooden "butt" which was recovered was to match the sharp portion and that it was the offending weapon had also to be proved as is necessary as held in Vijay Thakur v. State of Himachal Pradesh, 2014 (14) SCC 609.

6. There is no link between the discovery of the offending weapon and use of such weapon in commission of the crime. P.W.5 has spoken about an illicit relationship between the appellants Makhan Sk. and Kashmira Begam. But in the F.I.R. the de facto complainant has nowhere mentioned of the illicit relation between the two. P.W.1 has in his evidence stated that Kashmira made an extra judicial confession before the para people but the para people have not been examined.

7. P.W.1 is not a trustworthy witness as Alzolam which was administered to the victim was not sent for FSL and the same does not match with the postmortem report. P.W.1 has stated that the knife was found on the bed whereas P.W.8 has stated that the knife was found by the side of the bed, the I.O. (P.W.18) has stated that he found the knife in the verandah. Therefore, the place from where the knife was seized is not certain. Blood found on the knife so also on the clothes were not sent for FSL and the link in a case of circumstantial evidence gets disconnected. The offending weapon (Material Exhibit - III) was seized in the presence of P.W.1 and P.W.13. P.W.13 has turned hostile and the said seizure was not on the basis of the statement made by the accused Makhan Sk. The seizure list by which the wooden butt was seized has not been proved. Only the signature of P.W.13 has been proved and P.W.13 has turned hostile. Therefore, the seizure is of no importance. The said recovery cannot be relied on as blood on knife did not match with the blood on the clothes and as held in 2008 (3) SCC 2010, benefit of doubt ought to be given to the accused. It has been held in 2015 (11) SCC 174 that in a case of circumstantial evidence each link or event must be extricably linked.

8. In the instant case the chain has been broken by the knife and the clothes not being sent for FSL. The case of the prosecution has proceeded on mere suspicion which has not been proved. It is for the prosecution to prove its case and it is only then that resort can be taken to Section 106 of the Evidence Act as held in the case of Ranjit Singh v. The State of Punjab In a case of circumstantial evidence where investigation is defective, the benefit of doubt will go in favour of the accused as held in Prakash v. State of Karnataka, 2014 (12) SCC 133. For all the said reasons, therefore, the order of conviction and sentence be set aside.

9. Counsel for the State submits that the only two issues raised by Counsel for the appellants is with regard to recovery under Section 27 of the Evidence Act which must be made pursuant to a statement which has been recorded and it must be proved that the knife recovered was the offending weapon used in the commission of the offence. As held in Bodh Raj v. State Of J & K, 2002 (8) SCC 45 and Mohd. Arif @ Ashfaq v. State of Nct of delhi, (2011) 13 SCC 621 the recording of statement for purposes of recovery under Section 27 is not

mandatory. The information must be credible and the credibility of the information pursuant to which the wooden "butt" was recovered has been proved by P.W.18 (the I.O.). P.W.1 has also proved recovery under Section 27. P.W.8 has also proved recovery of the "butt" of the knife.

10. That the knife was used in the commission of offence will be evident from the postmortem report and the evidence of P.W.15 (Postmortem doctor). The administration of 4 tablets of Alzolam has been proved by P.W.1 when he says that tablets were seized by the police and while six tablets were there four were lying vacant. P.W.10 has also stated that he found the tablets on 31st Bhadra, i.e., on the date of seizure.

11. The case is based on circumstantial evidence and each of the circumstance has been linked. Therefore, Section 106 comes into play and the order of conviction and sentence be upheld.

12. Having considered the submissions of the parties in the said case there is no eyewitness. The case is based on circumstantial evidence and the circumstances are as follows:-

(i) 15th September, 11 p.m. is the date and time of incident.

(ii) On the fated day the daughter and son-in-law of Azijul, the elder brother of Habu Mondal and the victim had come to visit Habu Mondal the defacto complainant. As there was not sufficient space in his house the couple was sent to sleep in the house of the deceased.

(iii) A room was allotted to the couple and the deceased along with his wife and children slept on a bed in the verandah.

(iv) At 10 p.m. Ratan, Habu and Makhan were watching T.V. in the house of Makhan Sk.

(v) At 10:30 p.m. Habu left Makhan's house, 10 minutes later Makhan also went out from the house. When Ratan woke up he did not find Makhan in the house. Ratan's mother when she came to inform Ratan of the attack on the deceased did not find Makhan.

(vi) At 10:45 the wife of the deceased Kashmira woke up to feed her child and while feeding fell asleep.

(vii) At 11 p.m. she was woken by the victim due to injury inflicted on him. A hue and cry was raised by Kashmira which attracted the defacto complainant and others.

(viii) The deceased lying unconscious with the bleeding injury was taken to the hospital where he succumbed to his injuries.

(ix) Kashmira made an extra judicial confession to the para people that Makhan Sk. had given her three to four tablets which she administered to the deceased and thereafter they murdered Mantu (deceased).

(x) The police came the next morning.

(xi) The wooden "butt" of the knife was found lying on the bed in the verandah. Alzolam tablets being MAT Exhibit - II was seized from the house of the deceased.

(xii) Sikal was put from the outside of the room in which the daughter and son-in-law of Azijul were sleeping.

(xiii) When the deceased was taken to the hospital the presence of Makhan Sk. is evident but on the victim being declared dead, Makhan Sk. was no longer to be found.

(xiv) After 15 days Makhan was arrested and on his arrest he made a disclosure statement based on which the handle of the knife was recovered from Majirgore pond in the presence of police.

13. Each of the circumstance is so linked that the chain is complete and cannot be delinked and Section 106 of the Evidence Act comes into play. Just as the wife is supposed to be in the custody of her husband during night similarly, the husband is also in the custody of his spouse at night, and both are responsible for each other.

14. Kashmira was present in the Verandah in the company of her husband cannot be denied and, therefore, special knowledge is to be attributed to her. She has not in her 313 examination imported the presence of any third person at the P.O. Makhan in his 313 examination has admitted that he frequented the house of the victim while this very question has been denied by Kashmira. Kashmira in her 313 examination has admitted that she slept on the verandah with the victim and her two children and allowed the daughter and son-in-law of Azijul to sleep in the room. Although Kashmira has denied the bolting of the room from outside but the evidence of P.W.3 Babul, the son-in-law of Azijul is to the contrary when he says that he could not come out of the room as the Sikal of the room was closed from outside. It is only when he shouted from inside that some para people put off the Sikal and they came out. Therefore, the prosecution has been able to prove its case and one does not have to travel far to ascertain the motive for the offence. There was an illicit relationship between Kashmira and Makhan, the appellants herein. This motive has been adduced in the evidence by P.W.1 while being examined in-chief and no suggestion was put to him in cross-examination to dislodge the said fact.

15. P.Ws.2 and 5 have also proved the said illicit relation between Makhan and Kashmira. That the injury was caused by the knife has been proved by P.W.15 (postmortem doctor) when he says that he found "One stab wound on left side front of neck placed obliquely with upper edge 3 c.m. above suprasternal notch. The wound measured 4 c.m. x 5 c.m. x 5 c.m. with margin clean cut, slight undermining of the upper margin, clean cutting of underlying fascia muscle vessels and nerves with evidence of bleeding and local extravasation of blood. The direction of the track from above downwards and medially becoming slight

superficial at distal end. Evidence of slight tailing on the left side edge of the wound." P.W.8 has stated that Makhan came to his shop and asked for a knife. P.W.8 "gave a knife having wooden batt. One side of the knife was sharpen and another side was Khach Kata." From the said evidence it is evident that the rugged or edged part of the knife was not used. It was the sharp part of the knife that was used. Bruise was also found by the postmortem doctor (P.W.15). This evidences struggle or resistance by the victim. P.W.8 is the person from whom Makhan Sk. took the knife and he has categorically stated that one side of the knife was "sharpen" and other was "Khach Kata". The injuries match the sharp side of the knife and the bruise found by the doctor is the result of struggle and resistance.

16. Although it is contended by Counsel for the appellants that the disclosure made leading to recovery must be on the basis of the recorded statement but Section 27 of the Evidence Act does not stipulate the recording of a statement. It stipulates imparting of information and that this information was imparted to the I.O. (P.W.18) though mentioned in the evidence of P.W.18 (I.O.) is not in detail. Nonetheless the detailed information imparted will be found in the evidence of P.W.1 who has categorically stated as follows:-

"Makhan also told that he kept one part of the broken knife i.e. handle of the knife in the Majhigore pond. Police went to the pond along with Makhan. I and some other persons also accompanied police. At that time Makhan took out that handle of the knife from the pond ??????????????????????????????????????This was seized by police in my presence."

17. This is sufficient disclosure statement for recovery under Section 27 of the Evidence Act. P.W.1 found knife on the bed, P.W.8 also found the broken upper part of the knife at the side of the bed and the I.O. (P.W.18) found it in the verandah. On the fated night the victim along with Kashmira and his two children slept on a bed in the verandah and if P.Ws.1 and 8 found the knife on the bed and the P.W.18 found it in the verandah, it will not jeopardise the case of the prosecution as the bed was in the verandah. Therefore, though P.Ws.1, 8 and 15 so also P.W.10 the prosecution has been able to prove that it was the knife which was the offending weapon used in the commission of the offence.

18. Makhan was not found in his house by Ratan (P.W.12) and his mother (P.W.9). Makhan has neither adduced any defence witness nor given any explanation with regard to his whereabouts. Kashmira has also not stated why the Sikal was put from outside.

19. In view of AIR (1929) Lahore 344 and (2011) 13 SCC 621 the decisions cited by the appellants will not come to its aid.

20. 2015 Supreme (SC) 1193 is distinguishable on fact as no statement disclosing the fact/material to be discovered was proved before the Court. Such is not the case here. It has also been held that the pivotal fact is making of the statement to the police which leads to the recovery which is found in the instant

case through the evidence of P.W.18 and P.W.1.

21. Similarly Bhimappa Jinnappa Naganur v. State Of Karnataka, AIR (1993) SC 1469, (1985) Supreme (Cal) 11182, AIR (1979) SC 1262, (2003) 3 SCC 353 and Sattatiya @ Satish Rajanna Kartalla v. State Of Maharashtra, (2008) 3 SCC 210 are distinguishable on facts as recovery in the said cases was de hors the disclosure. (2014) 14 SCC 609 is a case of circumstantial evidence and it has been held that under Section 27 of the Evidence Act discovery of the material object at the disclosure of the accused should lead to the conclusion that the offence was committed by the accused. A close link is to be established between the discovery and use of the material object in the commission of the offence. In the instant case the disclosure led to discovery of the material object from the tank and the evidence of P.W.8 and P.W.15 (Postmortem doctor) supported the commission of the offence by the said material object.

22. There is no dispute with the proposition that in a case of circumstantial evidence the chain must be linked as held in the unreported case of Ranjit Singh v. State of Punjab, (2015) 11 SCC 178.

23. (2011) 13 SCC 621 while dealing with Section 27 of the Evidence Act has stated as follows:-

"169. Now coming to the second argument of failure to record the information, it must be held that it is not always necessary. What is really important is the credibility of the evidence of the investigating agency about getting information/ statement regarding the information from the accused. If the evidence of the investigating officer is found to be credible then even in the absence of a recorded statement, the evidence can be accepted and it could be held that it was the accused who provided the information on the basis of which a subsequent discovery was made. The question is that of credibility and not the formality of recording the statement. The essence of the proof of a discovery under Section 27 of the Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the court but if the court finds the fact of such information having been given by the accused in custody is credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been effected then the aspect of discovery will not suffer from any vice and can be acted upon."

The I.O. (P.W.18)'s evidence in respect of Section 27 is as follows:-

".....I apprehended him. Thereafter on the basis of the statement I recovered one wooden batt as shown by the accused Makhan from Majhigore Pukur standing near P.O. (One wooden batt is shown to the witness). This is the wooden batt, Mat Ext.III. This is the wooden batt seized by me as shown by the accused."

24. The evidence of P.W.1 in this regard is specific in terms as will appear from the relevant portion set-out hereinbefore. He has stated of the disclosure and recovery in his examination-in-chief which could not be demolished in cross-examination. In fact, he has re-asserted the statement made and the recovery.

25. For all the aforesaid reasons the order of conviction and sentence calls for no interference and the same is upheld and appeals dismissed.

26. Let a photostat copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

D.P. Dey, J. - I agree.